In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-627

BREZINA CONSTRUCTION CO., INC., A CORPORATION, AND NIELSEN SCOTT CO., INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In their third-party complaint, petitioners Brezina Construction Company and Nielsen Scott Company sought indemnity from the United States for the amount ($45,000) they had paid to plaintiff Richard E. Barr in settlement of his claim against them for personal injuries. Plaintiff Barr was seriously injured in a fall down an access stairway which had been installed by Nielsen, a subcontractor of Brezina, in a building at Hill Air Force Base in Utah. Brezina was performing remodeling work in the building under a contract with the United States, which furnished the

plans and specifications. Brezina had subcontracted the installation of the staircase to Nielsen.

Plaintiff Barr, on active duty in the Air Force, was performing his duties at the time of his injury. In his complaint against Brezina and Nielsen, Barr alleged that the fall was caused by the negligent installation and design of the stairway, specifically, the exposure of bolts protruding above the surface of the 2" x 6" plate to which the stairway was attached, and the absence of a platform or guardrail at the head of the stairway. In their third-party complaint against the United States, petitioners Brezina and Nielsen urged that they had called the alleged design deficiency to the government's attention, but had been instructed to proceed in accordance with the plans and specifications.

In dismissing the third-party complaint, the district court noted that the injured serviceman had no tort claim against the United States for service-related injuries, under *Feres* v. *United States*, 340 U.S. 135, and concluded that, in the absence of any claim of an express contract of indemnity or evidence of an implied contract, the contractors had no claim for indemnity against the United States (Pet. App. 27). Alternatively, the district court, applying Utah law, held that "the negligence claimed against the government is essentially of the same quality or type as that on which recovery against the third-party plaintiffs might be obtained. A mere difference in degree, rather than in the nature or quality of the negligence, would not justify indemnity" (Pet. App. 27-28).

On appeal, petitioners urged for the first time that

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they were entitled to indemnity for an alleged breach by the government of an implied warranty of workmanlike performance, under *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124. See Pet. App. 18-19. The court of appeals held that *Ryan Stevedoring* was inapplicable to petitioners' third-party claim because (1) "the facts and posture of the parties are vastly different" (Pet. App. 19) and (2) *Ryan* did not apply to non-maritime cases (Pet. App. 20-21).[1] The court concluded that the district court correctly applied Utah law and that the petitioners' action could not be maintained as one for contribution between joint tortfeasors or as a contract action for indemnity under that law (Pet. App. 21-25).

2. The question whether the principles enunciated in *Ryan Stevedoring* apply in non-admiralty cases, is not squarely presented here,[2] and review by this Court is not warranted.

In rejecting the application of *Ryan Stevedoring* to this case, the court of appeals stated (Pet. App. 19-20):

> Appellants' effort to transplant the *Ryan* body of law so as to make it applicable to our situation fails initially because the facts and posture of the

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[1] The court reached the issue of the applicability of *Ryan Stevedoring* to this claim only because it held initially that *Feres* v. *United States*, *supra*, did not bar "at the threshold" an indemnity action for service-connected injuries. In view of its disposition of the case, it was unnecessary for the court to have concluded that such a right of indemnity might exist despite *Feres*.

[2] Moreover, the disposition by the court below of this issue is not in conflict with any other court of appeals' decision. The court did not hold that there can be no circumstances outside of admiralty which give rise to an implied right of indemnification.

> parties are vastly different. Here the government is in much the same position as the shipowner in *Ryan*, whereas the position of appellants is not unlike that of the stevedoring company in *Ryan*. Thus, the roles are reversed and, anomalously, we have in effect the stevedoring company seeking indemnity against the owner.* * *

In *Ryan Stevedoring*, the shipowner, who had been held liable to the stevedoring company's injured longshoreman for the "unseaworthiness" of its vessel, was allowed to recover indemnity from the stevedoring company, despite the limitation of the latter's liability to its longshoremen by the Longshoremen's and Harbor Workers' Compensation Act. Thus, the owner was allowed to recover indemnity from his contractor for a liability the owner incurred by reason of the contractor's negligence. By contrast, petitioners here, whose own negligent construction, at least in part, caused the injury, are seeking indemnity from the owner of the facility where the injury occurred. Therefore, even were the principles of *Ryan Stevedoring* applicable to this case, petitioners would not be entitled to indemnity because, as held by the courts below, petitioners "are the ones who are directly responsible for the plaintiff Barr's injury" (Pet. App. 20).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

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